



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
1322 PATTERSON AVENUE SE SUITE 3000
WASHINGTON NAVY YARD DC 20374

IN REPLY REFER TO:

5720

Ser 14/319

August 12, 2014

Mr. JacQuan Welch
507 Spring Lake Crescent
Apartment 102
Virginia Beach, VA 23451

SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) APPEAL
DON-NAVY-2014-008342

Dear Mr. Welch:

This responds to your letter of July 26, 2014, received by our office on August 5, 2014, in which you appeal the United States Naval Academy's (USNA) June 26, 2014, denial of your June 18, 2014, request for a fee waiver and expedited processing in connection with your request for:

- a) Emails mentioning you by name received or sent by the Naval Academy Preparatory School (NAPS) Commanding Officer or Executive Officer;
- b) Fitness Reports (FITREPs) concerning allegations of your misconduct;
- c) The NAPS disciplinary manual; and
- d) Any records maintained by NAPS pertaining to you.

Your appeal is a request for a final determination under the FOIA. For the reasons explained below, your appeal is denied.

The FOIA provides that fees should be waived in cases where "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii). In order for information to contribute significantly to public understanding, disclosure of the information must "enlighten more than just the individual requester." Forest Guardians v. U.S. Dep't of Interior, 416 F.3d 1173, 1179 (10th Cir. 2005). The proper focus when considering a fee waiver request must therefore be on the benefit to be derived by the public rather than on any personal benefit to be derived by the requester.

With the exception of the NAPS disciplinary manual, which as discussed below you have already received, most if not all of the records you seek are only of interest to you. I find that disclosure of the information you request is unlikely to contribute to public understanding of government operations or activities and would provide no benefit to anyone but yourself. Since the production of the information creates no public benefit, your appeal for a fee waiver is denied.

With regard to your appeal for expedited processing, my office contacted the USNA upon receipt of your appeal to inquire into the details of your request. Based on this contact, my office learned that the USNA followed up on its letter 5720 28-203 of 26 Jun 14, which you included in your appeal, with letter 5720 28-210 of 7 Jul 14. The letter of July 7, 2014, provided without charge the responsive FITREPs and NAPS records and noted that your attorney, Mr. Thomas McCarthy, Sr., had obtained the NAPS disciplinary manual through other means. Since your request for FITREPS, NAPS records, and the NAPS disciplinary manual have already been processed, your appeal for expedited processing with regard to these portions of your request is denied as moot. Even if your request warranted expedited processing, this office can now grant no further relief other than production of the records that have already been provided.

Your appeal as it pertains to your request for emails received or sent by the NAPS Commanding Officer or Executive Officer is also denied. As explained in the USNA letter of July 7, 2014, the records already provided to you were released without charge under the Privacy Act. The emails you request, however, are not stored in a Privacy Act system of records and must be processed under the FOIA. See Krieger v. DOJ, 529 F. Supp. 2d 29, 42-44, 45-46 (finding that plaintiff “offers no facts suggesting that [emails] would have been indexed by name, or that an electronic folder existed that grouped emails related to him by name or other identifier” and noting that “a search function does not a system of records make”).

The FOIA requires agencies to issue regulations providing for the expedited processing of certain FOIA requests. Per Secretary of the Navy Instruction (SECNAVINST) 5720.42F, expedited processing is granted only when a requester can demonstrate a compelling need for the requested information. A compelling need exists under any of three circumstances: (1) when failure to obtain the records could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; (2) when the information requested concerns a breaking news story of general public interest; or (3) when failure to provide the information will result in the loss of substantial due process rights.

Your request and appeal as well as the email exchanges with the command and your counsel suggests the third circumstance - when failure to provide the information will result in the loss of substantial due process rights. In support of your appeal, you state that you are in danger of suffering irreparable harm due to a perceived violation of your due process rights. You also state that the requested information is necessary for you to request reconsideration of your denied entry into the USNA.

Neither your request, your appeal nor your attorney's emails explain how these NAPS CO/XO emails relate to the alleged violation of your due process rights or even how your due process rights are being violated. Though you state in your request that the requested records are needed to allow you to request reconsideration for entry into the USNA, you fail to explain how the emails you seek relate to your request for reconsideration. You also fail to demonstrate how a request for reconsideration invokes a substantial due process right. I am not convinced that a property or liberty interest has been violated that would demand constitutional due process protection in your efforts to become a student at the Naval Academy. Likewise, you have not specifically described how any procedural due process protections have been violated. Accordingly, your request for expedited processing based upon a lack of due process is denied.

To the extent you appeal the role of a Lieutenant from the USNA Staff Judge Advocate's (SJA) office in the processing of your request, your appeal is also denied. The USNA SJA office, like many SJA offices, is responsible for processing FOIA requests. This is a common duty of attorneys within commands and offices of the Department of the Navy. Contrary to your assertion that the USNA is seeking "to run out the clock" on your ability to gain admission, the USNA responded to your request and provided responsive records in a timely manner. Any misgivings about the Lieutenant's involvement in your request or speculation about the USNA dissuading you from seeking information are not supported by any facts of which I am aware or which you have brought to my attention in your appeal.

Since your appeals are denied, the USNA will resume processing your request for emails received or sent by the NAPS CO or XO upon confirmation by you to that office of your intent to proceed and your willingness to pay the estimated fees. Since your request for a fee waiver has been denied, any production of the requested emails will be billed in accordance with the estimates previously provided by the USNA under the FOIA. You retain the right to modify or narrow your request if you do not wish to pay the full amount estimated by the USNA. However you decide to proceed, you retain the right to appeal to this office any future substantive FOIA response by the USNA.

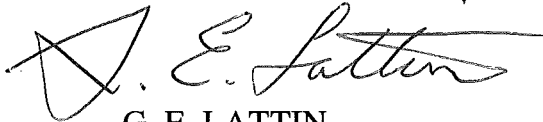
As the Secretary of the Navy's designee, I am responsible for this final denial of

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your appeal. You may seek judicial review of this decision.

Should you have further questions or concerns, my point of contact is LT Griffin Farris, JAGC, USN, who may be reached by email at griffin.farris@navy.mil or by telephone at 202-685-5447.

Sincerely,

A handwritten signature in cursive script, appearing to read "G. E. Lattin". The signature is written in dark ink and is positioned above the printed name.

G. E. LATTIN
Director
General Litigation Division

Copy to:
DNS-36
USNA